No. 21

In the Supreme Court of the United States

OCTOBER TERM, 1957

NEIL H. MCELROY, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, EX REL. DOMINIC GUAGLIARDO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Solicitor General,
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The Solicitor General, in behalf of Neil H. McElroy, Secretary of Defense, James H. Douglas, Secretary of the Air Force, and General Thomas D. White, Chief of Staff, United States Air Force, hereby petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the District Court was filed January 13, 1958, and is reported at 158 F. Supp. 171; it is set forth in Appendix A, *infra*, pp. 18–33. The opinions of the Court of Appeals have not yet been reported; they are set forth in Appendix B, *infra*, pp. 34–61.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on September 12, 1958, Appendix B, *infra*, pp. 61–62. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a person employed by and serving with the United States Air Force outside the continental limits of the United States can, under Article 2 (11) of the Uniform Code of Military Justice, be constitutionally prosecuted, convicted, and punished by court-martial overseas for the commission of a non-capital offense committed overseas.

2. Whether, in view of the decision in *Reid* v. *Covert*, 354 U. S. 1, Article 2 (11) of the Uniform Code of Military Justice can now be read as severably authorizing the court-martial of persons employed by and serving with the armed forces overseas who commit non-capital offenses abroad.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The following provisions of the Constitution are involved:

> Article I, Section 8. The Congress shall have Power * * *
>
> Clause 14. To make Rules for the Government and Regulation of the land and naval Forces. * * *
>
> Clause 18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other

> Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article 2 of the Uniform Code of Military Justice, 64 Stat. 109, as codified in 70A Stat. 37, 10 U. S. C. (Supp. V) 802, provides in pertinent part:

> Art. 2 The following persons are subject to this chapter: * * *
>
> (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

STATEMENT

The respondent is a citizen of the United States. He was employed in March 1954 by the United States Air Force at Nouasseur Air Depot, Morocco, as an electrical lineman. His duties consisted of maintaining and repairing air field lighting, and inspecting and repairing electrical conducts, transformers, lights, controls, ducts and manholes (R. 22).[1]

Respondent was not furnished with living quarters on the base, but lived with his wife in an apartment in Casablanca, Morocco (R. 28). He was entitled to quarters' allowance, mail, commissary and base exchange privileges, a United States Air Force (Europe) ration card, membership in the Air Force Officer's Club, and medical and dental care (R. 28).

[1] Record references are to the original record which has been filed herein

He was paid $506.88 per month by the Department of the Air Force (R. 29).

On July 18, 1957, respondent and two enlisted members of the Air Force, stationed at the Nouasseur Air Depot, were charged with committing larceny in violation of Article 121 of the Uniform Code of Military Justice, 10 U. S. C. 921 (Supp. V). They were accused of stealing leatherette goods and olive drab material having a value of $4,690.00, at Nouasseur Air Depot. They were also charged with a violation of Article 81 of the Uniform Code of Military Justice, 10 U. S. C. 881 (Supp. V) in that they conspired with each other to commit the offense of larceny under the Code (R. 23). Respondent and his co-defendants were informed of these court-martial charges against them on July 18, 1957, and on August 14, 1957, the charges were referred for a trial to a general court-martial convened by the Commander, Southern Material Area, Europe (R. 23).

After a four-day trial by general court-martial in Morocco, respondent and his co-defendants were found guilty as charged, except that the value of the stolen goods was found to be more than $50.00, rather than the $4,690.00 charged (R. 23). Respondent was sentenced to pay a fine of $1,000.00 and to be confined at hard labor for three years (R. 24). Upon review by the convening authority, the finding of guilty of larceny was disapproved because of an instructional deficiency, but the sentence as imposed was otherwise approved [1a] (R. 24).

[1a] A Board of Review in the Office of the Judge Advocate General, Air Force approved the findings of guilty but reduced

On December 2, 1957, respondent filed in the United States District Court for the District of Columbia a petition for writ of habeas corpus in which it was alleged, *inter alia,* that the military authorities lacked jurisdiction to try him and that his confinement under sentence of court-martial was unlawful (R. 1). At the time the petition was filed, he was confined in the Base Stockade, Nouasseur Air Depot, Morocco (R. 1). Subsequent to the filing of the petition in the District Court, respondent was transferred to the U. S. Disciplinary Barracks, New Cumberland, Pennsylvania, on January 8, 1957 (R. 46).

After hearing, the District Court concluded that civilian employees attached to the armed forces of the United States abroad may lawfully be subjected to trial by court-martial, held that respondent was not illegally detained of his liberty, and dismissed the petition (Appendix A, *infra,* pp. 32–33). The Court of Appeals for the District of Columbia Circuit reversed, one judge dissenting, and ordered respondent discharged from custody (Appendix B, *infra,* pp. 34–61). Respondent was admitted to bail pending appeal, pursuant to an order of the Court of Appeals.[2]

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the sentence to a two year confinement. See footnote 2, *infra.*

[2] During the course of this proceeding in the courts below, respondent and his co-defendants prosecuted administrative review of their trial and conviction before a Board of Review, pursuant to the applicable provision of the Uniform Code of Military Justice (Article 66, *et seq.*, 10 U. S. C. (Supp. V) 867, *et seq.*), see footnote 1a, *supra,* p. 4. Administrative appeals were exhausted. See the Opinion of the Court of Appeals, Appendix B, *infra.* p. 45, fn. 8, and Article 67, 10 U. S. C. (Supp. V) 867. In the courts below, petitioners had urged that this

REASONS FOR GRANTING THE WRIT

The questions presented are important matters of first impression in this Court, on which there is now a conflict among the courts of appeals. The basic issue is whether, within the framework of the Uniform Code of Military Justice, a person employed by the armed services at an overseas military installation may still be tried by court-martial for a violation of a non-capital offense against the Code.

1. This question is an open one. Recently the Court was confronted with the problem of courts-martial jurisdiction over "civilians" on two occasions, but neither ruling controls here. In *Toth* v. *Quarles*, 350 U. S. 11, the issue was whether a civilian who had been honorably discharged from the Air Force, and who had severed all connection with the military service, could thereafter be constitutionally tried by court-martial for an offense committed while in the service. That question, which the Court answered negatively, is plainly different from the issue now raised respecting trials of employees serving with the forces overseas.

In *Reid* v. *Covert*, 354 U. S. 1, the Court decided that dependents of military personnel who commit capital offenses in foreign countries cannot constitutionally be tried by courts-martial. The opinions in-

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proceeding was brought prematurely because respondent had not exhausted all proceedings available to him before the military tribunals. See *Gusik* v. *Schilder*, 340 U. S. 128. In view of the fact that these proceedings have been exhausted during the pendency of the judicial review and respondent's conviction and sentence have been finally affirmed, this point appears to have been mooted and is not raised or pressed in this Court.

dicate that the question of military trial in non-capital cases of other persons covered by Article 2 (11)—more particularly, of military trial for offenses committed by persons employed by the armed forces overseas—was carefully left open by the Court. The Court of Appeals in the instant case, also construing Article 2 (11), determined that the portions of the Article dealing with persons "serving with" and "employed by" the armed services were not severable from the category of persons "accompanying" the armed services which this Court construed in *Covert*, and that the category of capital offenses could not be distinguished from non-capital crimes. But the opinion of Mr. Justice Black, in which the Chief Justice, and Justices Douglas and Brennan concurred, stated (354 U. S. at 22):

> Even if it were possible, we need not attempt here to precisely define the boundary between 'civilians' and members of the 'land and naval Forces'. We recognize that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform.

And the concurrence of Mr. Justice Frankfurter was explicitly limited (354 U. S. at 45):

> The Court has not before it, and therefore I need not intimate any opinion on, situations involving civilians, in the sense of persons not having a military status other than dependents. Nor do we have before us a case involving a non-capital crime.

See also the concurrence of Mr. Justice Harlan, 354 U. S. at 75.

In short, the reading of Article 2 (11) by the majority of the Court of Appeals in this case cannot be derived from the careful treatment of this same Article in *Covert*. For this Court would hardly have found it necessary to hand down so deliberately restricted a ruling if in reality it could be said, as the Court of Appeals evidently felt, that the entire Article forms one indivisible whole. This Court decided only the issue of court-martial trials for dependents in capital cases.[3]

2. The ruling of the Court of Appeals here is in direct conflict with the recent decision of the Court of Appeals for the Third Circuit in *Grisham* v. *Taylor, Warden*, No. 12630, decided November 20, 1958.[4] The *Grisham* case involves the same problem of an overseas court-martial trial of an employee of the armed forces, and in one respect (the gravity of the offense) is more unfavorable to the Government's position than is the present case. The *Grisham* court stated the issue as follows (Appendix C, *infra*, p. 66):

> So we are confronted with the problem of the application of the *Covert* case to a civilian employee of the armed forces serving abroad,

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[3] As the two concurring opinions in *Covert* indicate, more was involved than the usual reluctance of the Court to decide questions not necessary to a decision in the case before it. If the majority of the Court of Appeals were correct with respect to non-severability, much of what was said by the concurring Justices would be rendered nugatory.

[4] The *Grisham* opinion is set forth in Appendix C, *infra*, pp. 63–68.

> prosecuted for a capital offense in peacetime and tried by court-martial. Grisham was charged in France with premeditated murder, a capital offense. The conviction was for unpremeditated murder which is not a capital offense.

Upon consideration of all the factors, including the decision of the District of Columbia Circuit in the instant case with which it disagreed (Appendix C, *infra*, p. 65), the Third Circuit held that employees of the armed forces overseas are so closely connected with those forces that the military have jurisdiction over them, and can constitutionally try them by courts-martial even for unpremeditated murder.

Subsequent to this Court's opinions in *Covert*, the United States Court of Military Appeals has also held on two occasions that court-martial jurisdiction can be exercised over employees of the armed forces. *United States* v. *Dyer*, 9 U. S. C. M. A. 64, 25 C. M. R. 326; *United States* v. *Wilson*, 9 U. S. C. M. A. 60, 25 C. M. R. 322. And the United States District Court for the District of Colorado in *United States ex rel. Wilson* v. *Bohlender*, Civil No. 6161, in an opinion dated November 10, 1958, has likewise held that the military have jurisdiction over a civilian employee who commits an offense against the Uniform Code while employed by the Army overseas.

3. It is our position that the Third Circuit and the Court of Military Appeals are correct, and that the court below has erred. Respondent was "in" the Air Force for the purposes of court-martial jurisdiction even though he did not wear its uniform.

(*a*). From the point of view of statutory authority,

respondent is clearly covered by Article 2 (11); as a person "employed by * * * the armed forces outside the United States * * *," *supra*, p. 3, he was subject to the trial procedures set up under the Uniform Code of Military Justice. The Uniform Code contains a very broad severability clause (Section 49 (d) of the Act of August 10, 1956, 70A Stat. 640, Appendix C, *infra*, p. 65), and under established principles of statutory construction the *Covert* ruling as to dependents did not carry with it the rest of Article 2 (11).

(*b*). Under Article 1, Section 8, Clause 14 of the Constitution, Congress is empowered "To make Rules for the Government and Regulation of the land and naval Forces." By Clause 18, it is also empowered "To make all Laws which shall be necessary and proper for carrying into Execution * * *" this power. The basis of the governmental power being asserted against respondent is power under these constitutional provisions, asserted by virtue of his employment by, and close contact with, the uniformed military. The respondent was an integral part of the military installation of Nouasseur Air Depot, Morocco. He worked side by side with military personnel; he worked on military equipment; his superiors were uniformed officers. He was entitled to and received benefits which were available to him only because of his affinity by employment with the military, such as membership in the officer's club, a ration card, use of the base commissary, and medical and dental care. His very job as a lineman on the overseas air base was itself a truly military function.

The fact is that persons who are employed in the armed forces overseas are not in a meaningful sense "civilians" for whom the trial protections of Article III, and the Fifth and Sixth Amendments were intended and should be applied.[5] The Court's opinion in *Toth* indicated that "the primary business of armies and navies [is] to fight or be ready to fight wars should the occasion arise" and the "trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function" (350 U. S. at p. 17). It is in this respect that the Congressional mandate directing that persons employed by the armed services at overseas installations be subject to military justice has its greatest importance. For while it may be "merely incidental" to an army's principal function to be able to try persons in or connected with the military so as to maintain discipline, this incidental function is still a basic and significant one. Without the ability to maintain law and order in a foreign land, an army would be powerless to fulfill its first obligation of fighting or being able to fight. Without discipline and a system for maintaining equal justice, military effectiveness would be seriously impaired.

In the context of an overseas military installation, and in order to have an effective system of discipline, justice must be uniform. Employees who serve with troops overseas, who are subject to the same military authority, who live their daily lives with the uni-

[5] This assumes that a practical method of Article III trial could be devised for persons stationed overseas charged with non-capital offenses, rather than a trial under foreign law.

formed personnel, who are engaged and trained to form a single cohesive organization with servicemen, and who are quasi-permanently on foreign soil without becoming a part of the foreign nation simply because they are of the military contingent, should be subject to the rules and regulations which are promulgated to govern the entire military community abroad.

The present case illustrates the problem. If the ruling of the Court of Appeals stands, we would have the anomalous situation of two out of three co-conspirators standing convicted and punished because they wore uniforms, and the third conspirator, the respondent here, going unpunished, despite the fact that he was equally guilty of the acts charged and equally an integral part of the Air Force military base in Morocco. All three defendants were members of the same military installation; they had the same commanding officer; they had practically identical rights and privileges at the installation. No distinction is normally drawn between uniformed soldiers and employees at the military base by the people of the host country. Likewise, it is fair to say that employees in respondent's position generally consider themselves to be fully a part of the military contingent abroad. They are "in" the armed forces even though they have not been formally inducted and do not wear a uniform.

(*c*). Historically, civilian employees of the class to which respondent belongs, serving with the armed forces in the field, have been deemed subject to military jurisdiction. In *Duncan* v. *Kahanamoku*, 327

U. S. 304, 313, this Court recognized "the well-established power of the military to exercise jurisdiction over members of the armed forces, [and] those directly connected with such forces", and cited the cases of *Ex parte Gerlach*, 247 Fed. 616 (S. D. N. Y. 1917); *Ex parte Falls*, 251 Fed. 415 (D. N. J. 1918); *Ex parte Jochen*, 257 Fed. 200 (S. D. Tex. 1919); *Hines* v. *Mikell*, 259 Fed. 28 (C. A. 4), certiorari denied, 250 U. S. 645.[6] This same jurisdiction has been sustained in time of peace. *In re Varney*, 141 F. Supp. 190 (S. D. Cal.). In each of these cases the District Court dismissed petitions for habeas corpus and sustained the constitutional right of the military to try persons who were not soldiers but who were serving with or were employed by the military forces. Jurisdiction to try the petitioners by courts-martial was asserted under an Article of War then in force which is practically identical with Article 2 (11) of the Uniform Code.

Provision for trial of "civilians" serving with the forces goes far back in Anglo-American history.[7] For instance, Article 31st of the Massachusetts Articles of War, adopted on April 5, 1775, provided:

[6] The authority exercised in these cases was exercised under Clause 14 under which Congress has authority to govern and regulate the armed forces, not under the "war powers". See *Ex parte Quirin*, 317 U. S. 1.

[7] See Brief for Appellant, *Reid* v. *Covert*, No. 701, Oct. Term, 1955, pp. 32–34; Supplemental Brief for Appellant and Petitioner on Rehearing, *Reid* v. *Covert*, No. 701, Oct. Term, 1955, *Kinsella* v. *Krueger*, No. 713, Oct Term, 1955, pp. 76–80; Reply Brief for Appellant and Petitioner on Rehearing, *Reid* v. *Covert*, No. 701, Oct. Term, 1955, *Kinsella* v. *Krueger*, No. 713, Oct. Term, 1955, pp. 37*ff*.

> All sellers and retailers to a camp, and all persons whatsoever serving with the Massachusetts Army in the field, though not enlisted Soldiers, are to be subject to the Articles, Rules and Regulations of the Massachusetts Army. [Winthrop, *Military Law and Precedents*, 2d ed. (1920), p. 950.]

In addition, there were five other Articles of the Massachusetts Articles of War which provided for the trial and punishment, including the death penalty, by court-martial of civilians serving with the army.

Prior to the Revolution, the British had adopted the Articles of War of 1765 which placed civilians connected with the Army under military discipline. (Winthrop, *id.* at p. 941). The American Revolutionary Army was governed by similar provisions under Articles of War adopted by the Continental Congress on June 30, 1775. Journals of Continental Congress, Vol. II, 1775, p. 116. Article XLVIII of these Articles provide:

> All officers, conductors, gunners, matrosses, drivers or any other persons whatsoever, receiving pay or hire, in the service of the continental artillery, shall be governed by the aforesaid rules and articles, and shall be subject to be tried by courts-martial, in like manner with the officers and soldiers of the Continental troops. [Winthrop, *id.* at p. 957.]

The importance of that 1775 provision becomes apparent when it is considered that at the time of the Revolution artillerymen, and more particularly the drivers of the wagons and caissons, were not soldiers or uniformed troops but were civilian experts. *Encyclopedia Britannica*, Vol. 8, p. 448; *Encyclopedia*

Americana, Vol. 2, p. 364. Article XLVIII of the 1775 Articles also illustrates the difference in the powers granted to Congress in Article 1, Section 8, clause 12, "to raise and support Armies", and clause 13, "to provide and maintain a Navy", when contrasted with its power to govern and regulate "the land and naval Forces." *Forces* may well be broader in scope than "armies" which might be said to include only soldiers and officers. See Maltby, *Courts-Martial and Military Law* (1813), p. 31.

The Articles of War enacted by Congress for the government of the army, subsequent to the adoption of the Constitution, have invariably applied court-martial jurisdiction to civilian employees serving with the army in the field. Article 60 of the Articles of War enacted April 10, 1806, contained such a provision, 2 Stat. 366, and similar provision was made in the revision of 1874, Rev. Stat. (2d ed. 1878), p. 236 (Article 63). Similar authority was conferred in all subsequent reenactments and revisions—in 1916, 39 Stat. 651; 1920, 41 Stat. 787; and in the adoption of the Uniform Code of Military Justice, 64 Stat. 109, codified in 70A Stat. 37, 10 U. S. C. (Supp. V) 802 (11).

4. The problem posed by this case is not confined to this respondent nor is it restricted even to as small a group as was affected by the decision of this Court in *Covert*. As was indicated in the Reply Brief for Appellant and Petitioner on Rehearing in Nos. 701 and 713, Oct. Term, 1955 (*Reid* v. *Covert*, and *Kinsella* v. *Krueger*), pp. 62–63, 100, over 20,000 (as of Decem-

ber 31, 1956) American civilian employees were serving with the American armed forces in a number of foreign countries.[5] The number of violations of law which might be committed by such a group can, of course, only be estimated. But in any event it is clear that the question of jurisdiction over these persons is one of great importance, not only to the government and regulation of the land and naval forces of the United States, but also to the foreign relations of this nation with the countries in which these civilian employees are stationed.

In view of the conflict in the decisions of the lower courts, it is now impossible to determine under what system of justice these persons are to be held accountable for any misdeeds they may commit. On so significant an issue, involving as it does a question of constitutional rights and powers, a definitive decision by this Court is essential.

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[5] Our foreign treaty obligations commit to the American Military Commander the entire responsibility for the conduct of this class of personnel. This is one of the reasons for exercise of Congressional power in enacting Article 2 (11). It is noteworthy, for example, that Congress has recently exempted from the penalty provisions of the Federal Aviation Act not only uniformed personnel, but certain civilian employees of the Department of Defense because such employees are subject to the Uniform Code of Military Justice. Pub. Law 85-726, Sec. 901 (a), August 23, 1958, 85th Cong. 2d Sess.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.[9]

J. LEE RANKIN,
Solicitor General.

W. WILSON WHITE,
Assistant Attorney General:

HAROLD H. GREENE,
WILLIAM A. KEHOE, JR.,
Attorneys.

DECEMBER 1958.

[9] There is being filed simultaneously herewith a Jurisdictional Statement in the case of *Kinsella v. United States, ex rel. Singleton*, on direct appeal from the United States District Court for the Southern District of West Virginia, pursuant to the provisions of 28 U. S. C. 1252. That case involves the question of whether a soldier's spouse who accompanied her husband overseas is constitutionally amenable to trial by court-martial for the commission of a non-capital offense in violation of the Uniform Code of Military Justice.

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 123–57

UNITED STATES OF AMERICA EX REL. DOMINIC GUAGLIARDO, PETITIONER

v.

NEIL H. MCELROY, SECRETARY OF DEFENSE, ET AL., RESPONDENTS

OPINION

Irwin Geiger, Esq., and Michael A. Schuchat, Esq., both of Washington, D. C., for the petitioner.

Oliver Gasch, Esq., United States Attorney; Edward F. Troxell, Esq., Principal Assistant United States Attorney; and John W. Kern III, Esq., Assistant United States Attorney, all of Washington, D. C., for the respondents.

The question presented in this *habeas corpus* proceeding, is whether a civilian employee attached to the armed forces of the United States stationed in a foreign country, is subject to trial by court-martial for an offense connected with his activities.

The issue arises on a return to an order to show cause granted in response to a petition for a writ of *habeas corpus* filed by a prisoner confined at an Air Depot in Morocco, against the Secretary of Defense,

the Secretary of the Air Force, and the Chief of Staff of the United States Air Force. The petitioner, Dominic Guagliardo, was employed by the Department of the Air Force as an electrical lineman at Nouasseur Air Depot, Morocco. On July 18, 1957, he was charged with larceny of Government property consisting of leatherette goods and olive drab fabric material, valued at about $4,690. In addition, he and two other persons were charged with conspiracy to commit larceny. He was tried and convicted by a general court-martial convened at the Air Depot and was sentenced to confinement at hard labor for three years and a fine of $1,000. The convening authority disapproved the finding of guilty on the first of the two charges, but approved the sentence as to the second charge. The petitioner is now a prisoner at the Base Stockade, at the above mentioned Air Depot in Morocco. The matter still remains to be considered by the Board of Review of the Office of the Judge Advocate General, as well as by the Judge Advocate General. If after going through these channels the sentence is approved, the petitioner will still have the right to petition the United States Court of Military Appeals for a review of any alleged error of law.

The petitioner has applied to this court for a writ of *habeas corpus* on the ground that he had been deprived of his constitutional rights to indictment by a grand jury and trial by jury. The respondents filed a return and answer setting forth the prior proceedings in detail and asserting that civilian employees who accompany or serve with the armed forces of the United States in the field, are subject to trial by court-martial. A traverse to the return has been filed by counsel for the petitioner. The matter was heard on the petition, the return and the traverse.

In limine the respondents interposed the objection that the petitioner had not exhausted all the remedies available to him before military tribunals and that, therefore, this proceeding has been brought prematurely. This contention would be completely sustained by *Gusik* v. *Schilder,* 340 U. S. 128, if that case stood alone. Subsequent decisions of the Supreme Court, however, throw a different light on this question.

The case of Toth is illuminating in this connection. Toth had served in the Air Force in Korea. After he was discharged from the service, he returned to his home in Pittsburgh, and resumed his civilian occupation. He was later arrested by the Air Force police and transported to Korea for trial by court-martial on a charge of murder alleged to have been committed while he was in the service. The District Court for the District of Columbia issued and sustained a writ of *habeas corpus,* and discharged Toth on the ground that the Uniform Code of Military Justice did not authorize the removal of a civilian to a distant point for trial by court-martial.[1] The court expressly stated that the objection to the jurisdiction of the court-martial to try Toth, based on constitutional grounds, was premature. The Court of Appeals for the District of Columbia Circuit reversed the order of the District Court.[2] On certiorari the Supreme Court reversed the decision of the Court of Appeals and reinstated the action of the District Court.[3] The Supreme Court, however, did not confine itself to passing on the narrow point on which the District Court predicated its decision, but held broadly that Congress lacked power to authorize trial by court-martial of a person in the position of Toth. This conclusion was reached

[1] *Toth* v. *Talbott,* 114 F. Supp. 468.

[2] *Talbott* v. *United States ex rel. Toth,* 94 U. S. App. D. C. 28.

[3] *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11.

in spite of the fact that Toth had made no effort to exhaust his remedies within the military system.

In *Reid* v. *Covert*, 354 U. S. 1, 4, the Supreme Court held that there was no constitutional authority to try the respondent by court-martial and directed that she be released from custody, in spite of the fact that she had not exhausted her remedies in the military system. As appears from the opinion of the court, a retrial by court-martial as a result of a reversal of the conviction by the Court of Military Appeals was pending when the case was argued and decided by the Supreme Court. To be sure, it does not appear that the objection that there was a failure to exhaust prior remedies was urged by the Government in either of these cases. Nevertheless, it could have been raised by the Court *sua sponte*. It would not be appropriate for this court to assume that in spite of its decision in the *Gusik* case, *supra*, the Supreme Court overlooked the point in the *Toth* and *Reid* cases. That this matter was not mentioned in either opinion, may be due merely to the fact that the Court did not consider it worthy of discussion. This court cannot reasonably reach any conclusion other than that the *Gusik* case has been overruled *sub silentio* by the *Toth* and *Reid* cases, insofar as it applies to the necessity of exhausting other available remedies in a case in which the jurisdiction of a court-martial is challenged on constitutional grounds. Consequently, the objection that the petitioner has failed to exhaust all of his remedies within the military system is overruled.

This brings us to a consideration of the merits. Jurisdiction of courts-martial over the person of the petitioner in this proceeding is predicated on Article 2 of the Uniform Code of Military Justice (form-

erly 50 U. S. C. § 552; now 10 U. S. C. § 802), the pertinent provisions of which are as follows:

> "The following persons are subject to this chapter:
>
> * * * * *
>
> "(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, *persons serving with, employed by, or accompanying the armed forces outside the United States* and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands." (Emphasis supplied.)

It is contended by the petitioner that subsection (11), insofar as it is applicable to civilians, is unconstitutional in that it deprives them of the right not [to] be prosecuted for a criminal offense except by indictment by a grand jury, and of the right to trial by jury.

The pertinent constitutional provisions are the following:

> *Article I, Section 8, Clause 14:*
>
> "The Congress shall have Power * * * To make Rules for the Government and Regulation of the land and naval forces;"
>
> *Article III, Section 2, Clause 3:*
>
> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."
>
> *The Fifth Amendment, Clause 1:*
>
> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,

except in cases arising in the land or naval forces, * * *"

The Sixth Amendment, Clause 1:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * *"

It is well established beyond the necessity of discussion that the power of the Congress to make rules for the government and regulation of the land and naval forces, includes the authority to provide for trials by courts-martial, and that in cases cognizable by military tribunals, neither the right to indictment by grand jury as a basis for a prosecution, nor the right to a trial by jury is applicable.[4] The ultimate question to be decided in connection with the resolution of the constitutional issue in this case, is to what groups of persons may the Congress extend court-martial jurisdiction. More specifically, the query is whether for the purposes of Article I, Section 8, Clause 14, the phrase, "land and naval forces", is to be limited to commissioned and enlisted personnel in uniform, or whether it may include civilian employees who are attached to the land or naval forces and perform duties in connection with their maintenance or operation.

A consideration of this topic should properly begin with a scrutiny of the rulings of the Supreme Court in this field. In making such an analysis, we must be guided by the precepts enunciated by Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, 399–400:

"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those

[4] *Ex parte Milligan*, 4 Wall. 2, 123. *Ex parte Quirin*, 317 U. S. 1, 40. *Whelchel* v. *McDonald*, 340 U. S. 122, 127.

> expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Our attention must be directed to two cases. In *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, it was held that a former member of the armed forces who had been discharged from the service and was no longer within the control of the armed forces, was not subject to trial by court-martial for an offense committed during his term of service.

Reid v. *Covert*, 354 U. S. 1, involved the status of a wife of a member of the armed forces of the United States, who accompanied her husband while he was stationed on foreign soil. This case was heard and decided by eight members of the Supreme Court, as Mr. Justice Whittaker did not participate. Mr. Justice Black delivered an opinion in which the Chief Justice, Mr. Justice Douglas and Mr. Justice Brennan joined, and in which the view was expressed that civilian wives, children, and other dependents of members of the armed forces, could not be constitutionally subjected to trial by court-martial, since they could not be regarded as any part of the armed forces. It must be emphasized that this conclusion was reached by only four members of the Court. Mr. Justice Frankfurter and Mr. Justice Harlan wrote separate opinions concurring in the result, but limiting their conclusion to the view that in capital cases civilian dependents of members of the armed forces could not

be constitutionally tried by court-martial. Mr. Justice Clark, with whom Mr. Justice Burton joined, wrote a dissenting opinion. Consequently, the only point on which a majority of the justices concurred is that in a capital case a civilian dependent of a member of the armed forces may not be tried by court-martial. Six Justices joined in that view.

The state of the Supreme Court's decisions on this question may, therefore, be summarized as follows:

> A former member of the armed forces, who has been discharged and is no longer within the control of the military, is not subject to trial by court-martial for an offense committed during his term of service.
>
> A wife, a child, or other dependent of a member of the armed forces is not subject to trial by court-martial in a capital case.
>
> The Supreme Court has not determined whether a dependent accompanying a service man is subject to trial by court-martial in a case other than capital.
>
> Similarly, the Supreme Court has never had occasion to decide whether a civilian employee attached to the armed forces in a foreign country, is subject to trial by court-martial.

Obviously, the position of civilian employees is not only different in fact, but distinct in principle from that of members of service men's families. The use of civilian employees is necessary and sometimes indispensable for the operation of the armed forces. To that extent they may be deemed part of the armed forces. This is not the case with families of service men. The families are present for the mutual comfort and happiness of the military personnel and their wives and children, but the armed forces can readily operate without the presence of families.

Mr. Justice Black in *Reid* v. *Covert, supra,* at page 23, expressly recognized that "there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military, or did not wear a uniform." He added, "But the wives, children and other dependents of servicemen cannot be placed in that category, * * *" Thus, members of the Supreme Court have recognized a distinction in principle between dependents of servicemen and civilian employees of the armed forces.

In determining whether the words "land and naval forces" as used in Article I, Section 8, Clause 14, of the Constitution, are to be restricted to the uniformed personnel formally mustered into the service, or should also include civilian employees attached to the armed forces, it is necessary to consider the background of the constitutional provision.[5] It is also essential to bear in mind certain general historic principles of constitutional interpretation and construction. The constitutional history of the United States demonstrates that one of the forces that transformed a weak, loose confederacy of thirteen small colonies nestled against the Atlantic Coast into a large, powerful and prosperous nation, has been the fact that a broad and liberal construction has been placed by the Supreme Court on the enumerated powers of the Congress, thus enabling the building of a strong central government that can withstand the vicissitudes of time. This policy was inaugurated by the historic, epoch-making opinions of Chief Justice Marshall, who was an outstanding statesman, endowed with far-sighted vision, as well as a renowned jurist.

It would seem surplusage to quote his memorable words in *McCulloch* v. *Maryland,* 4 Wheat. 316, that

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[5] *Gompers* v. *United States,* 233 U. S. 604, 610.

ring through the ages. They are often repeated and are all too familiar.

A similar but less well known expression is found in an opinion of Justice Story in *Martin* v. *Hunter*, 1 Wheat. 304, 326–327:

> "The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen, that this would be perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen, what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require."[6]

The historic background of Clause 14 is significant. It is hardly necessary to advert to the fact that the framers of the Constitution were men of profound learning, but that they were also men of broad practical

[6] Among the many cases expressing and applying the doctrine of broad construction of congressional powers, the following are typical: *Gibbons* v. *Ogden*, 9 Wheat. 1, 187-9, 222; *Legal Tender Cases*, 12 Wall. 457, 532; *Juilliard* v. *Greenman*, 110 U. S. 421, 439; *Matter of Strauss*, 197 U. S. 324, 330–331.

experience, who were in close contact with the problems of their day and who had a thorough knowledge of the needs in the light of which the Constitution was being framed. The British Articles of War of 1765, which were in force at the beginning of the Revolutionary War, placed civilian employees, contractors and suppliers connected with the Army under military discipline. Thus Article XXIII provided:[7]

> "All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field, though no inlisted Soldiers, are to be subject to orders, according to the Rules and Discipline of War."

The American Revolutionary Army was governed by similar provisions. Article XXXII of the Articles of War, adopted by the Continental Congress, on June 30, 1775, read as follows:[8]

> "All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army."

A like enactment is found in Section XIII, Article 23, of the Articles of War, adopted by the Continental Congress on September 20, 1776:[9]

> "All suttlers and retainers to a camp, and all persons whatsoever serving with the armies of the United States in the field, though no inlisted soldier, are to be subject to orders, according to the rules and discipline of war."

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[7] William Winthrop, *Military Law and Precedents*, 2d Ed., p. 941.

[8] Journals of the Continental Congress, Volume II, 1775, p. 116.

[9] Journals of the Continental Congress, Volume V, 1776, p. 800.

It was against this background that the members of the Constitutional Convention of 1787 formulated the provision empowering the Congress to make rules and regulations for the government of the land and naval forces of the United States. It is reasonable to infer that the framers of the Constitution were familiar with previous English and American usage in the matter and, therefore, employed the term "land and naval forces" in a broad sense. Such has also been the continuous construction of this phrase by the Congress from the early days of the Republic. Early congressional interpretation of a constitutional provision at a time when some of the Founding Fathers were still living and active, is particularly significant. Great weight must be attached to such contemporaneous construction.[10] Similarly, continuous construction of a constitutional provision by repeated Acts of Congress and long acquiescence in such an interpretation "entitles the question to be considered at rest".[11]

The Articles of War enacted by Congress from time to time have invariably applied court-martial jurisdiction to civilian employees and similar persons attached to the armed forces in the field. The first group of Articles of War passed by the Congress were approved on April 10, 1806. Article 60 provided as follows:[12]

> "Article 60. All suttlers and retainers to the camp, and all persons whatsoever, serving with

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[10] *Cohens* v. *Virginia*, 6 Wheat. 264, 418; *Cooley* v. *Board of Wardens of Port of Philadelphia et al.*, 12 How. 299, 315; *Lithographic Co.* v. *Sarony*, 111 U. S. 53, 57; *McPherson* v. *Blacker*, 146 U. S. 1, 27; *Knowlton* v. *Moore*, 178 U. S. 41, 56.

[11] *Prigg* v. *Pennsylvania*, 16 Pet. 539, 621. See also, *The Laura*, 114 U. S. 411, 416; *Springer* v. *United States*, 102 U. S. 586, 599; *Field* v. *Clark*, 143 U. S. 649, 691.

[12] 2 Stat. 366.

> the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

The Articles of War were revised in 1874. Article 63 of that revision reads as follows:[12]

> "Art. 63. All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

Another revision of the Articles of War was dated August 29, 1916. Article 2 enumerates the groups of persons subject to military law, and includes the following:[13]

> "(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles; * * *"

Precisely the same provision is found in the Articles of War passed in 1920.[14] The Uniform Code of Military Justice, adopted in 1952, contains a similar provision, which has been heretofore quoted.

Although, as indicated above, the precise question involved in the instant case has never been passed upon by the Supreme Court, other Federal courts that have had occasion to deal with this topic have uniformly held that civilian employees accompanying or

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[12] 2 Rev. Stat. 236 (2d Ed., 1878).

[13] 39 Stat. 651.

[14] 41 Stat. 787, Art. 2 (d).

serving with the armed forces of the United States outside of the territorial jurisdiction of the United States may be subjected to court-martial jurisdiction, *Hines* v. *Mikell* (C. C. A. 4th) 259 Fed. 28; *Ex parte Falls* (D.-N. J.) 251 Fed. 415; *Ex parte Jochen* (S. D.-Tex.) 257 Fed. 200; *McCune* v. *Kilpatrick*, 53 F. Supp. 80; *In re Varney's Petition*, 141 F. Supp. 190. The United States Court of Military Appeals has reached the same conclusion, *United States* v. *Marker*, 1 USCMA 393; *United States* v. *Weiman*, 3 USCMA 216; *United States* v. *Burney*, 6 USCMA 776.[16]

The final clause of Article I, Section 8, of the Constitution sometimes denominated by historians as the "elastic clause", empowers the Congress to make all laws which shall be necessary and proper for carrying into execution "the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." That a law subjecting personnel of the type involved in this case to trial by court-martial is necessary and proper for carrying into execution the power to make rules for the government and regulation of the land and naval forces, is demonstrated by a consideration of the consequences of any conclusion that would deny this authority to the Congress. It is manifestly essential to enforce law and order at stations maintained by the armed forces of the United States in foreign countries. The use of civilian employees is frequently indispensable in connection with the operation of these stations. If court-martial jurisdiction may not be exercised in respect to such civilians, other means of law enforcement would create difficulties

[16] The opinion of Judge Latimer in *United States* v. *Burney* cited in the text, contains an exhaustive and scholarly discussion of this subject.

that in some instances might prove insuperable. One possible course is to establish Federal civilian courts abroad for the trial of offenses committed by civilian employees of the armed forces. Whether foreign governments would permit the exercise of such extra-territorial jurisdiction is doubtful. It has never been done in modern times except in occupied territory and except in the Orient by special agreements, which have been cast into discard. Moreover, it would not be practicable to obtain juries in foreign countries, for no one could be required to serve on a jury. Similarly, it would not be possible to issue compulsory process against witnesses.

Another possibility would be to bring such offenders back to the United States for trial. Such an arrangement would not be practicable as to serious offenses, for there would be no way of compelling the presence of witnesses. They could be induced to come only on a voluntary basis. As to petty offenses, this course would be too costly and cumbersome. The third possible course is to turn such offenders over to foreign courts for trial."[17]

In the light of the foregoing discussion, the court reaches the conclusion that civilian employees attached to the armed forces of the United States abroad may be subjected to trial by court-martial and that hence Article 2, subsection (11) of the Uniform Code of Military Justice is constitutional; that the court-martial by which the petitioner was tried had jurisdiction

[17] See concurring opinion of Mr. Justice Harlan in *Reid* v. *Covert*, 354 U. S. 1, p. 76, note 12.

Joseph M. Snee, S. J., and Kenneth A. Pye, in their work on "*Status of Forces Agreement; Criminal Jurisdiction*", p. 44, state that the fundamental choice is not between a Federal civilian court and an American court-martial, but between an American court-martial and a foreign court.

over him; and that, consequently, the petitioner is not unlawfully restrained of his liberty.

The order to show cause is discharged and the petition is dismissed.

ALEXANDER HOLTZOFF,
United States District Judge.

JANUARY 13, 1958.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14304

UNITED STATES OF AMERICA, EX REL. DOMINIC GUAGLIARDO, APPELLANT

v.

NEIL H. MCELROY, SECRETARY OF DEFENSE, DEPARTMENT OF DEFENSE, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

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Decided September 12, 1958

Mr. Michael A. Schuchat for appellant.

Mr. John W. Kern, III, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Lewis Carroll*, Assistant United States Attorney, were on the brief for appellee.

Before EDGERTON, *Chief Judge*, and FAHY and BURGER, *Circuit Judges*.

FAHY, *Circuit Judge:* Appellant was a civil service employee of the Department of the Air Force of the United States, employed as an electrical lineman at the Nouasseur Air Depot near Casablanca, Morocco. His duties were to maintain and repair airfield lighting and to inspect and repair electrical conduits, transformers, lights, controls, ducts, and manholes.

He lived with his wife off the Depot, in nearby Casablanca. He was entitled to quarters allowance, mail, Commissary and Base Exchange privileges, a United States Air Force ration card, membership in the Air Force Officers Club, and medical and dental care at the Depot.

On July 18, 1957, he and two enlisted men[1] were charged with stealing certain leatherette goods and fabric material at the Depot, in violation of Art. 121, Uniform Code of Military Justice, 10 U. S. C. § 921 (Supp. V, 1958), and with conspiring to commit larceny, in violation of Art. 81, U. C. M. J., 10 U. S. C. § 881 (Supp. V, 1958). They were tried by a general court-martial and found guilty. Appellant was sentenced to pay a fine of $1,000 and to be confined at hard labor for three years.

In due course the case reached the Board of Review in the Office of the Judge Advocate General, pursuant to Art. 66, U. C. M. J., 10 U. S. C. § 866 (Supp. V, 1958). Appellant then petitioned the United States District Court for the District of Columbia for a writ of habeas corpus. He contended that the military authorities lacked jurisdiction to try him and that accordingly his confinement under the court-martial sentence was unlawful. Relief was denied by the District Court, opinion reported at 158 F. Supp. 171, followed by this appeal.[2]

Appellees contend that the jurisdictional question is prematurely raised because appellant has not exhausted the judicial processes available to him under

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[1] One or more civilian Moroccan nationals were also alleged to have been parties to the same transaction. They have been tried in the regular courts of Morocco.

[2] We ordered appellant admitted to bail pending the appeal.

[3] Neil H. McElroy, Secretary of Defense, James H. Douglas, Secretary of the Air Force, and General Thomas D. White, Chief of Staff, United States Air Force.

the Uniform Code of Military Justice. They rely upon *Gusik* v. *Schilder*, 340 U. S. 128. But that case we think is inapposite, for there court-martial jurisdiction over the accused unquestionably existed since he was a member of the United States Army. He sought to attack collaterally a court-martial judgment because of alleged errors in the court-martial proceedings, without exhausting the administrative remedies available for their correction. Here, in contrast, the question is whether appellant is subject to court-martial jurisdiction at all. Habeas corpus proceedings were used to determine such a question in *Reid* v. *Covert*, 354 U. S. 1, and *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11.[1] The point was not discussed, but in view of *Gusik* v. *Schilder, supra*, could not have been overlooked by the Supreme Court, especially as the Court in *Reid* v. *Covert* specifically noted that the petition was brought "while Mrs. Covert was being held * * * pending a proposed retrial by court-martial * * *." 354 U. S. at 4. If appellees have no court-martial jurisdiction whatever over appellant the Great Writ is available to release him from their custody.

Appellees defend their jurisdiction solely by reason of Art. 2, U. C. M. J., 10 U. S. C. § 802 (Supp. V, 1958). This provision in terms does extend court-martial jurisdiction to appellant for the offense charged. The provision reads:

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[1] Moreover, the highest court available under the Uniform Code of Military Justice has consistently upheld jurisdiction over persons in the same legal posture as appellant. Appellant should not be required to await a similar decision in his case. *United States* v. *Wilson*, No. 9638, U. S. C. M. A., March 28, 1958; *United States* v. *Rubenstein*, 7 U. S. C. M. A. 523, 22 C. M. R. 313; *United States* v. *Burney*, 6 U. S. C. M. A. 776, 21 C. M. R. 98; *United States* v. *Marker*, 1 U. S. C. M. A. 393, 3 C. M. R. 127.

> The following persons are subject to this chapter [The Uniform Code of Military Justice]:
>
> * * * * *
>
> (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States. * * *

Appellant's contention is that this provision is unconstitutional as applied to him, a civilian employee, in time of peace.

The question thus raised must be decided in light of the decision of the Supreme Court in *Reid* v. *Covert, supra.* The Court there held that in a capital case the wife of a member of the armed forces, who accompanied her husband abroad and there killed him, could not be tried by court-martial—that Art. 2 subparagraph (11), *supra,* was unconstitutional as so applied. The basis for the decision was that the wife was entitled to a jury trial as provided by Art. III, § 2 of the Constitution and to the safeguards of the Fifth and Sixth Amendments.

Article III, § 2 of the Constitution provides that the trial of all crimes excepting cases of impeachment shall be by jury. The pertinent Fifth Amendment provision is that no person shall be held to answer for a capital or otherwise infamous crime unless upon presentment or indictment of a grand jury except in cases arising in the land or naval forces. The pertinent Sixth Amendment provision is that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. None of these provisions was complied

with in *Reid* v. *Covert*. And none was complied with in the present case.

Appellees point, however, as was done in *Reid* v. *Covert*, to Art. I, § 8, cl. 14, of the Constitution, which empowers Congress "to make Rules for the Government and Regulation of the land and naval Forces." It is urged that this provision, together with the Necessary and Proper Clause of the Constitution, Art. I, § 8, cl. 18, has enabled Congress to establish the court-martial jurisdiction specified in subparagraph (11) of Art. 2, U. C. M. J., *supra*, by carving out exceptions to the application of Art. III, § 2 of the Constitution and of the Fifth and Sixth Amendments. Clearly the Constitution does authorize such an exception for members of "the land and naval Forces." But in *Reid* v. *Covert* the Chief Justice and Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Brennan, in the opinion written by Mr. Justice Black, would not permit an exception related to the "land and naval Forces" to include civilians unless in rare and unusual circumstances; and Mr. Justice Frankfurter and Mr. Justice Harlan would not permit such an exception to include a civilian wife charged with a capital offense, though accompanying her service husband with the forces outside the United States.

The same considerations, set forth elaborately in the opinions, which thus brought agreement among a majority of the Supreme Court as to the wife in *Reid* v. *Covert*, would not permit a civilian employee in the situation of appellant to be tried by the United States by court-martial on a capital charge. He would be entitled to a civilian trial by jury. We can think of no constitutional basis for approving the court-martial of such an employee for a capital offense which would not apply equally to Mrs. Covert. Of course the case before us is not a capital one, but if Mrs.

Covert or an employee such as appellent could not be tried by court-martial on a capital charge, notwithstanding the provision of the Military Code purporting to authorize such a trial, the existing congressional plan for extending court-martial jurisdiction to persons accompanying or employed by the armed forces outside the United States exceeds constitutional bounds. Congress did not exclude capital cases. The statute embraces without exception persons "employed by" the forces outside the United States and thus would deprive all civilians in that category of the right to trial by jury for any offense defined in the Military Code, capital or noncapital, and regardless of the nature of the offense or of the relation of the offense or of the employment to the security, discipline, or effectiveness of the forces. The scope of Art. III, § 2 of the Constitution and of the Fifth and Sixth Amendments, as expounded in *Reid* v. *Covert*, prevents such a curtailment of trial by jury and concommitant extension of court-martial jurisdiction over civilians in time of peace.

This is not to say that legislation bringing some civilian employees within court-martial jurisdiction for some offenses would necessarily be unconstitutional. Cf. *Reid* v. *Covert*, 354 U. S. at 22–23. It is reasonable to assume that the fullness of the Necessary and Proper Clause, considered with the authority of Congress "to make Rules for the Government and Regulation of the land and naval Forces," and considered also with the present and potential responsibilities of the United States throughout the world, has not been exhausted. But *Reid* v. *Covert* plainly shows that these sources of legislative power do not sustain the all-inclusive extension of military jurisdiction over civilian employees attempted by subparagraph (11) of Art. 2 of the Military Code.

Since the intended broad sweep of subparagraph (11) is unconstitutional the question arises whether the courts should rewrite the provision along narrower lines and decide the question of its validity as applied to this particular employee for this particular offense. There are numerous instances in which the Supreme Court has held that such judicial reframing of legislation should not be attempted. *Butts* v. *Merchants & Miners Transp. Co.*, 230 U. S. 126; *Employers' Liability Cases*, 207 U. S. 463, 496–504; *Illinois Cent. R.* v. *McKendree*, 203 U. S. 515, 528–30; *United States* v. *Ju Toy*, 198 U. S. 253, 262–63; *James* v. *Bowman*, 190 U. S. 127, 139–42; *Baldwin* v. *Franks*, 120 U. S. 678; *United States* v. *Harris*, 106 U. S. 629, 641–42; *Trade Mark Cases*, 100 U. S. 82, 98–99; *United States* v. *Reese*, 92 U. S. 214, 221. See, also, *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312–17; *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 242; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 518–22; *Hill* v. *Wallace*, 259 U. S. 44, 70.

In *Reese* the Court said:

> We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. * * *.
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> * * * * *
>
> To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.
>
> We must, therefore, decide that Congress has not as yet provided by "appropriate legislation" for the punishment of the offence charged in the indictment * * *.

92 U. S. at 221.

In the *Trade Mark Cases, supra,* the same principle is stated as follows:

> [I]t is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body.

100 U. S. at 98.[5]

In *Yu Cong Eng* the opinion was by Mr. Chief Justice Taft and contains this language:

> The effect of the authorities we have quoted is clear to the point that we may not in a criminal statute reduce its generally inclusive terms so as to limit its application to only that class of cases which it was within the power of the legislature to enact, and thus save the statute from invalidity.

271 U. S. at 522.

The case at bar is not one where Congress has laid down a definition of jurisdiction in terms taken from the Constitution, leaving administrative agencies and the courts to apply the definition by a process of inclusion and exclusion according to the facts of particular cases, as was *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 30–31.

Appellees urge, however, that since the statute contains a severability clause the doctrine of the *Reese* and kindred cases does not apply. Section 49 (d) of

[5] While in *Reese* and the *Trade Mark Cases* the Court spoke of crimes defined so broadly as to be beyond constitutional authority, the principle invoked in those cases applies to this attempted extension of court-martial jurisdiction over crimes or persons in such broad terms as to be unconstitutional.

the Act of August 10, 1956, Public Law 1028, 84th Cong.,[6] provides:

> If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

As the Supreme Court held in *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 241–42, the general effect of a severability clause is to substitute for the presumption that the legislature intended its act to be effective as an entirety, the opposite presumption of severability; that is, that the legislature intended the act to be divisible. It is said that this presumption must be overcome by considerations which make evident the inseverability of the provisions of the statute, or the clear probability that with the invalid part eliminated the legislature would not have been satisfied with what remains. In *Williams* itself, though the statute was not penal and also contained a severability clause the Court said:

> it requires no extended argument to overcome the presumption and to demonstrate the indivisible character of the act under consideration.

278 U. S. at 242.

To the same effect is *Hill* v. *Wallace*, 259 U. S. 44, 70.

Other cases relied upon by appellees include *Virginia Ry.* v. *System Federation No. 40*, 300 U. S. 515;

[6] Public Law 1028 enacted into positive law Title 10 of the United States Code, containing, *inter alia*, the Uniform Code of Military Justice. The severability clause, though a part of Public Law 1028, was not enacted into Title 10. It can be found however in the note at page 293 of Supplement V of the 1952 Code (1958).

Wright v. *Vinton Branch Bank*, 300 U. S. 440; *Crowell* v. *Benson*, 285 U. S. 22; *St. Louis, S.W. Ry.* v. *Arkansas*, 235 U. S. 350; *The Abby Dodge*, 223 U. S. 166; *United States* v. *Delaware and Hudson Co.*, 213 U. S. 366.

We do not think the severability clause authorizes us to divide subparagraph (11) so as to raise the question whether or not persons in appellant's situation might validly be subjected to court-martial jurisdiction. Though *Reid* v. *Covert* involved a wife and not a civilian employee, we know from that decision that the intended broad coverage of civilians, whether accompanying or employed by the forces abroad, exceeds constitutional bounds. Neither the severability clause nor any other provision affords any standard to guide a constitutional decision in the instant case except the invalid standard of "persons . . . employed by" the armed forces outside the United States. We do not know how to subdivide this provision as Congress might have done if Congress had known it could not be upheld as written. The present severability clause shows only a very general intention to leave in effect all valid applications which are severable from invalid applications, giving no indication of what valid applications Congress thought would be severable. Should we undertake to say that the "persons employed by" clause is divisible so as to apply to appellant we would be called upon to decide whether civilians in general employed by the armed forces outside the United States in time of peace are subject to court-martial jurisdiction. Four members of the Supreme Court in *Reid* v. *Covert* have said in effect that they are not subject to such jurisdiction; and a majority of the court has not indicated that they are.

The Supreme Court has repeatedly referred to "the wisdom of refraining from avoidable constitutional pronouncements." *United States* v. *International Auto. Workers*, 352 U. S. 567, 590. This settled principle leads us to decide this case on the ground of nonseverability. Should we hold severable the application of the statute to appellant for the crime here charged, and go on to decide whether his conviction by court-martial was constitutional, obviously we would be deciding an important constitutional question. This course is not required and, therefore, should not be pursued in the circumstances of this case. The relevant precedents call for a decision on the basis spelled out in the *Reese* and kindred cases. Under those decisions we hold that subparagraph (11), which the Supreme Court has held is invalid as presently enacted, *Reid* v. *Covert*, is nonseverable into fragments which have not been specified by Congress or as to which Congress has not furnished criteria for a case-by-case judicial application. At least the application of the subparagraph to such a civilian as appellant, charged with such an offense as is here involved, cannot be validly carved out of the invalid general spread of that provision.

Our decision leaves Congress free if it so desires to rewrite the legislation with inclusion of criteria for court-martial jurisdiction in terms related more definitely to the security, discipline, and effectiveness of the armed forces abroad. Or Congress might decide in light of *Reid* v. *Covert* to adopt some other course for the trial by the United States of civilians employed with such forces in time of peace. These legislative matters are not for us to determine; we mention these possibilities because they bear upon the reasons for our decision that the present generality of subparagraph (11) is not to be subdivided by the courts so as to in-

clude appellant when the provision cannot validly include all who were intended to be covered by its terms as the statute left the hands of Congress. There is a complete absence of any legislative standard for the inclusion of appellant other than a standard that includes all civilian employees with the forces abroad, and that standard is so extensive as to be invalid as a basis for denial to civilians tried by the United States in time of peace of the protection of Article III, § 2 of the Constitution and of the Fifth and Sixth Amendments.[7]

Appellant should be discharged from the custody of appellees.[8]

Reversed and remanded.

BURGER, *Circuit Judge*, dissenting: The majority holds invalid a conviction of a civilian employed overseas by the Air Force, under Article 2, Uniform Code of Military Justice, for theft of Government property (valued at over $4000). They do this even though, as I shall try to demonstrate, there is no other feasible means of law enforcement available at a foreign military base for crimes against the United States. While purporting to make a narrow decision, the consequence of the majority holding is to strike down, for all practical purposes, all of the UCMJ which relates to trial of non-military personnel in peacetime. This holding is reached by two steps (a) the authority of *Reid*

[7] The principle invoked by appellees that a person may attack as invalid only the attempted invasion of his own rights is not applicable, for the attempted application here is to appellant himself.

[8] Since submission of the case we have been advised by the United States Attorney that on June 9, 1958, the United States Court of Military Appeals has denied appellant's petition for a grant of review of his court-martial conviction.

v. *Covert*[1] and (b) that this court cannot sever the part of the statute relating to "persons accompanying * * * the armed forces outside the United States" from that part of the statute relating to "persons serving with, [or] employed by * * * the armed forces outside the United States." (10 U. S. C. § 802 (11), Art. 2 UCMJ)

First, *Reid* v. *Covert* does not warrant the conclusion reached by the majority, and second, the statutory intent as well as the explicit language renders "persons serving with [or] employed by" so readily distinguishable and severable from "persons accompanying" members of the armed forces that no real problem of statutory construction is involved. I therefore see no escape from meeting the constitutional issue and do not think the majority has succeeded in avoiding that issue.

Article I, § 8, cl. 14, of the Constitution empowers Congress "to make Rules for the Government and Regulation of the land and naval Forces." It has been held that this grant empowers Congress to make rules governing this defined class without strict regard for certain constitutional guarantees applicable to citizens generally.[2] The inquiry here is whether Clause 14, properly interpreted in its constitutional context, empowers Congress to provide for military trials in non-capital cases of United States civilians employed oveseas by the armed forces in peacetime. The Supreme Court's holding that Congress did not have the power to provide for such court-martial trials of mili-

[1] 354 U. S. 1 (1957), *rehearing nad reversing*, 351 U. S. 487 (1956), *and* Kinsella v. Krueger, 351 U. S. 470 (1956).

[2] Dynes v. Hoover, 61 U. S. (20 How.) 65 (1857); Ex parte Reed, 100 U. S. 13 (1879). Among those constitutional rights which Congress may deny to this defined class are trial by jury and venue requirements (Art. III, § 2, and amend. VI), indictment by grand jury (amend. V).

tary *dependents* charged with *capital* offenses by implication declared unconstitutional one phrase of Article 2 (11) of the Uniform Code of Military Justice, and that phrase only insofar as it relates to capital offenses. *United States* v. *Dial*, 9 U. S. C. M. A. ——, 26 C. M. R. —— (Aug. 26, 1958).[3] The majority here extends the scope of *Reid* v. *Covert* in two directions: first, to civilian employees (as distinguished from dependents), and second, to non-capital cases.

Judicial caution, always appropriate in dealing with such far reaching matters as this, is especially in order where, as here, the joint action of the Legislative and Executive Branches under scrutiny deals with the national defense and delicate matters of foreign policy.[4] The presumptions of constitutionality should not be quickly cast aside merely because a closely connected but legally unrelated portion of the same statute has previously been declared unconstitutional.

Article 2 of the Uniform Code of Military Justice[5] lists various categories of persons who are subject to military jurisdiction. Subsection (11) so classifies persons serving with, employed by, or accompanying

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[3] The "persons accompanying" phrase of art. 2 (11), UCMJ, 10 U. S. C. § 802 (11) (Supp. V, 1958).

[4] "These powers ["to raise armies; to build and equip fleets; to prescribe rules for the government of both * * *."] ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or* * * * *means which may be necessary to satisfy them.* The circumstances which endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." THE FEDERALIST No. 23, at 145 (Ford ed. 1898) (Hamilton) (Emphasis not added.).

[5] 10 U. S. C. § 802 (Supp. V, 1958).

the armed forces outside the United States * * *." *Reid* v. *Covert* invalidates by implication only that part applying to "persons accompanying," but my colleagues find it impossible to divide subparagraph (11) so as to sustain the distinction between "persons accompanying" on the one hand and "persons serving with [or] employed by" on the other. *Reid* v. *Covert* itself, the single case on which they rely, furnishes one basis for this distinction.

I

The opinion of Mr. Justice Black, in which he speaks for four members of the Court (himself, the Chief Justice and Justices Douglas and Brennan), is very carefully limited to "wives, children and other dependents of servicemen." (354 U. S. at 23.) It expressly recognizes "that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not been inducted into the military or did not wear a uniform." (354 U. S. at 23.)

Justice Black's opinion declares that military jurisdiction can never be extended to "civilians," but it scrupulously refrains from drawing a clear line of the boundary between civilians and persons "in" the armed forces. Although it explicitly rejects the argument that the Necessary and Proper Clause could justify extension of military jurisdiction "to any group of persons beyond that class described in Clause 14" (354 U. S. at 20–21), it avoids delineating that class with precision. Indeed, the very language quoted above clearly indicates that the class might well include civilian employees as distinguished from dependents, or at the least, some of them.

Mr. Justice Frankfurter, concurring separately, was unwilling to read Clause 14 in isolation from the

Necessary and Proper Clause. Only by reading the two clauses together, he said, may there "be avoided a strangling literalness in construing a document that is not an enumeration of static rules but the living framework of government designed for an undefined future." (354 U. S. at 43.) Mr. Justice Frankfurter was articulating the same warning we find in the FEDERALIST No. 23 dealing with congressional powers "to raise armies." The test he proposed for determining whether the Constitution permits trial of a given civilian for a given crime is whether that person was "so closely related to what Congress may allowably deem essential for the effective 'Government and Regulation of the land and naval Forces' that [he] may be subjected to court-martial jurisdiction" (354 U. S. at 44) for his particular offense. Justice Frankfurter's concurrence was accordingly limited to the position that Congress may not in peacetime provide for military trials of *civilian dependents* charged with *capital* offenses without a grand jury indictment and trial by jury. He makes this "narrow delineation of the issue" (354 U. S. at 45) clear beyond any possible doubt.

Mr. Justice Harlan, in his separate concurrence, also disagreed with Justice Black's dictum that Clause 14 power "was intended to be unmodified by the Necessary and Proper Clause." (354 U. S. at 67.) He emphasizes the position, also taken by Mr. Justice Frankfurter, that special considerations apply in cases involving capital offenses. He warned that the Court should not unnecessarily foreclose its "future consideration of the broad questions involved in maintaining the effectiveness of . . . national [military] outposts" (354 U. S. at 77) by deciding more than was directly involved in the case before it.

The position of the majority of this court is that when the Supreme Court struck down that part of Article 2 (11) relating to capital cases involving "persons accompanying the armed forces," it unavoidably struck down Article 2 (11) in its entirety, and thereby destroyed all authority to try by courts-martial persons "serving with [or] employed by" the armed forces charged with non-capital offenses. Nothing held, or even intimated by the Supreme Court warrants this result, and familiar rules for judicial guidance dictate two courses which would lead to the result I urge: first, this case is readily distinguishable, on its facts, from *Reid* v. *Covert;* second, we should not hold non-severable a part of the statute which is in no way dependent on or logically related to that part invalidated by the Supreme Court.

The three opinions in *Reid* v. *Covert* indicate that there are two approaches which may be used to distinguish the present case from the one decided there. First, on the approach of Mr. Justice Black, I suggest that appellant may well be "in" the armed forces for the purposes of Clause 14 jurisdiction and that that Clause, considered in isolation, justifies military jurisdiction in this case. Second, on the approach suggested by the concurring opinions, I conclude that military jurisdiction is warranted here even if it be thought that appellant was not within the specific class delimited by Clause 14. These conclusions are plainly consistent with the holding of *Reid* v. *Covert,* unless we ignore the distinctions so carefully drawn there by all the opinions.

Even if the conclusion is ultimately reached that "persons serving with [or] employed by" may not be subjected to military jurisdiction, the reasoning and the route must be different. The problem of constitutional interpretation inescapably presented by

this case cannot be side-stepped by citing *Reid* v. *Covert* as controlling. It will take a new and different step to reach the conclusion that the Constitution prohibits exercise of military jurisdiction in the cases now before us.*

In *Reid* v. *Covert* the Court considered historical precedent for court-martial jurisdiction over civilians and found that British constitutional history since the Revolution of 1689 and American history strongly compelled the result that was reached.[6] This same historical approach supplies us with one solid criterion for distinguishing the present case from *Reid* v. *Covert*. Ever since 1689 military law has been regarded by English speaking people as an unwelcome but necessary abridgment of civil rights. The first British Mutiny Act (1689), after declaring that no man should be punished except by a judgment of his peers, proceeded: "Yet, nevertheless, it being requisite for retaineing such Forces * * * in their Duty an exact discipline be observed."[7] Despite the pervading desire evidenced here and elsewhere[8] to place all possible limitations upon the jurisdiction of courts-martial, the British Articles of War in force at the time of our Revolution provided that

> "All Suttlers and Retainers to a Camp, and all Persons whatsoever, *serving with* Our Armies

*By order entered October 23, the original language of the dissenting opinion was amended to read as in the text. [Footnote inserted.]

[6] Justice Black's opinion, 354 U. S. at 23–35.

[7] As reprinted in WINTHROP, MILITARY LAW AND PRECEDENTS 929 (2d ed., Reprint 1920) (hereinafter cited as WINTHROP).

[8] See the various authorities cited by Mr. Justice Black, 354 U. S. at 24–28; see also the report of Parliamentary debates on the British Mutiny Act (1689) set out in 19 RAPIN, HISTORY OF ENGLAND 188–92 (5th ed. Tindal 1763).

> in the Field, though no inlisted Soldiers, are to be subject to Orders according to the Rules and Discipline of War." (Emphasis added.)[9]

A substantially identical provision was enacted by the Continental Congress in 1775,[10] was reenacted in 1776,[11] and again included in the first Articles of War enacted after the Constitution, in 1806.[12]

Although there is surely reasonable debate over the meaning of the phrase "in the field" as it is used in these articles, there can be no doubt that all of these statutes make allowance for persons "serving with" the armed forces while remaining silent concerning those "accompanying" the army. This is more than a mere verbal distinction. Although there is some slight authority for holding wives of soldiers subject to court-martial under these provisions,[13] there is definite emphasis on the element of "serving." The fact that two classes of employees—suttlers and retainers—were used surely must be regarded as significant. Whatever disagreement there may be over the precise construction of these articles, it cannot be disputed that, under certain circumstances, military court-martial jurisdiction over civilian employees of the armed forces was standard practice at the time the Constitution was adopted. Provision for such jurisdiction has been maintained in the statutes in some form ever since.[14]

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[9] British Articles of War of 1765, art. 23 section 14, reprinted in WINTHROP 941; the same provision is contained in the British Articles of War of 1774, art. 23, section 14, reprinted in DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 595 (3d ed. 1915).

[10] 2 J. CONT. CONG. 116 (1775).

[11] 5 J. CONT. CONG. 800 (1776), reprinted in WINTHROP 967.

[12] 2 Stat. 366, reprinted in WINTHROP 981.

[13] See WINTHROP 99 n. 94 and authorities cited there.

[14] Articles of War of 1806, art. 60, 2 Stat. 366, reprinted in WINTHROP 981; Articles of War of 1874, art. 63, REV. STAT.

This power has been repeatedly upheld as constitutional with respect to its exercise during wartime.[15] The central issue here is whether its peacetime exercise is constitutional. Several times it has been held so by various courts under circumstances substantially similar to those in the present case.[16] On the other hand, no case prior to *Reid* v. *Covert* has been cited or found upholding military jurisdiction over the wife or other dependent of a serviceman, either in peace or war. Indeed, it was not until 1916 that Congress expanded the class subject to courts-martial by adding thereto "persons accompanying" the armed forces.[17] Even then it was not made clear that this phrase included dependents, and the cases arising under it have involved employees, not dependents.[18]

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§ 1342, p. 236 (1875), reprinted in WINTHROP 991; Articles of War of 1916, art. 2 (d), 39 Stat. 651; UCMJ, art. 2 (11), 10 U. S. C. § 802 (11) (Supp. V, 1958).

[15] Perlstein v. United States, 151 F. 2d 187 (3d Cir. 1945), *cert. granted*, 327 U. S. 777, *dismissed as moot*, 328 U. S. 822 (1946); Hines v. Mikell, 259 Fed. 28 (4th Cir.), *cert. denied*, 250 U. S. 645 (1919); Grewe v. France, 75 F. Supp. 433 (E. D. Wis. 1948); In re Berue, 54 F. Supp. 252 (S. D. Ohio 1944); McCune v. Kilpatrick, 53 F. Supp. 80 (E. D. Va. 1943); In re Di Bartolo, 50 F. Supp. 929 (S. D. N. Y. 1943); Ex parte Jochen, 257 Fed. 200 (S. D. Tex. 1919); Ex parte Falls, 251 Fed. 415 (D. N. J. 1918); Ex parte Gerlach, 247 Fed. 616 (S. D. N. Y. 1917).

[16] Matter of Varney, 141 F. Supp. 190 (S. D. Cal. 1956); United States v. Wilson, 9 U. S. M. C. A. 60, 25 C. M. R. 322 (1958); United States v. Burney, 6 U. S. C. M. A. 776, 21 C. M. R. 98 (1956).

[17] Articles of War of 1916, art. 2 (d), 39 Stat. 651.

[18] *E. g.*, Perlstein v. United States, 151 F. 2d 167 (3d Cir. 1945), *cert. granted*, 327 U. S. 777, *dismissed as moot*, 328 U. S. 822 (1946); In re Di Bartolo, 50 F. Supp. 929 (S. D. N. Y. 1943). For the legislative history of this addition, see S. REP. No. 130, 64th Cong., 1st Sess. Pertinent portions are reprinted in In re Di Bartolo, *supra* at 932–33.

Without doubt military jurisdiction over essential civilian employees at overseas bases would be sustained in wartime. There remains unanswered whether courts can take judicial notice of the fact that what we call peacetime is, except for degree, much like the sporadic, limited, undeclared warfare with savage Indian tribes and bands a hundred years ago.[19] Under the majority holding a civilian employee of the military on duty in Korea in the 1950–54 period, declared only to be an "emergency," would be immune from punishment for stealing military supplies, except as the "civilian government" of South Korea would try him under its criminal code—if any.

III

The authority for military jurisdiction, with respect both to its wartime and peacetime exercise, rests on Article 1, § 8, cl. 14, read together with the Necessary and Proper Clause.[20] Constitutional authority has thus been found for military jurisdiction over civilian employees of the armed forces who are serving outside the United States. Appellant contends, however, that this jurisdiction can be justified only by the existence of a declared state of war.[21] While such authority must be strictly limited and its exercise scrutinized, it seems to me that circumstances exist other than a state of declared war, which warrant its

[19] *Cf.* U. S. v. Wiese, No. CC 488, National Archives; U. S. v. Trailer, No. HH 882, National Archives; U. S. v. Barnard, No. HH 895, National Archives; U. S. v. Ringsmer, No. HH 880, National Archives.

[20] See, *e. g.*, Matter of Varney, 141 F. Supp. 190 (S. D. Cal. 1956); Ex parte Jochen, 257 Fed. 200 (S. D. Tex. 1919); United States v. Wilson, 9 U. S. C. M. A. 60, 25 C. M. R. 322 (1958).

[21] Brief for Appellant, p. 9.

employment until and unless a workable substitute can be devised.

In the words of THE FEDERALIST, "the circumstances which endanger the safety of nations are infinite and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed."[22] The circumstances which today endanger the safety of this and all free nations are utterly different in nature and degree from those which confronted the drafters of the Constitution. The unique perils we face could not be anticipated in the 1780's but the constitutional architects carefully recognized this and left the future reasonably free to deal with its own problems. Among the "unforeseeables" which they prophetically allowed for is the fact that while armies of that day depended chiefly on uniformed soldiers, today in what is technically "peacetime" there are roughly 25,000 civilian employees serving our armed forces at numerous military bases spread throughout the world. That military bases on this scale are maintained by us in peacetime is, in itself, a startling innovation since World War II. Yet the majority holds that Congress may not provide court-martial trial for these essential civilian employees at foreign bases.

This holding at once overlooks the changing world we live in, to which I have already alluded, and forges "constitutional shackles" on the power of Congress and the Executive to deal with present day realities. The "undeclared," "limited" and "cold wars" since 1950 have engaged more men than all the wars in which our country participated from our Revolution to World War I. Moreover it cannot be denied that

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[22] THE FEDERALIST No. 23, at 145 (Ford ed. 1898) (Hamilton).

many of the "persons serving with [or] employed by . . . the armed forces outside the United States" are more essential than the uniformed soldier; that a civilian electronics expert or chemical engineer may be more essential than some generals, where the function of the base is the maintenance of aircraft and readying atomic arms and ICBM's.

The majority opinion attempts to avoid the impact of all these hard and real considerations by relying on *Reid* v. *Covert*, but these very facts contribute to distinguishing the two cases. These, I am confident, were the considerations which impelled the Supreme Court there to emphasize the narrow scope of its holding. These, no doubt, were the factors that led Mr. Justice Harlan to inveigh against foreclosing "future consideration of the broad questions involved in maintaining the effectiveness of * * * national outposts."[2] Our present holding, if it stands, could have, and probably will have, a major impact on the effectiveness of our "national outposts" at a time when so-called limited warfare may be imminent in various parts of the world; at such a time, above all, none but the most imperative restraints should be imposed by the courts. However expressed, the issue here is simple: it is the delicate problem of balancing important rights of citizens against the needs of maintaining efficient national security. In the narrow context of a capital offense by a wife of a soldier in *Reid* v. *Covert* the Court found the scales tipped in favor of the individual interest. No challenge to that holding is involved in here resolving the balance in favor of broad national interests. I believe further that the holding I suggest for this case should extend to all non-capital cases involving overseas civilian employees of the armed forces. The question should not

[2] 354 U. S. at 77.

be left open for further litigation on a case-by-case basis with the result that one employee would be amenable to military jurisdiction by virtue of a possibly more intimate connection with the services than appellant while another would not be. To do so would lead to unnecessary administrative as well as judicial chaos.[24] I do not reach the question of capital cases of those serving with or employed by the military.

If there were a feasible means, reasonably available for dealing with this problem, Congress should be required to provide procedures for these civilian employees, securing for them indictment by grand jury and trial by jury. But in the absence of a feasible substitute, Clause 14 together with the Necessary and Proper Clause[25] seems to me to empower Congress to subject these employees to trial by court-martial. No such substitute is suggested by the majority and I am unable to find any substitute. Several alternatives come to mind as being possible, but none are practical or desirable. The six alternatives are (see footnotes for objections): (a) induct all employees into the service and place them in uniform regardless of training or pay rates; (b) leave trial for crimes committed abroad entirely in the hands of the foreign sovereign in whose territory the act occurred; (c) bring accused employees back to the United States for trial; (d) set up new Article III courts (either within or without the military establishment) to pro-

[24] See 71 HARV. L. REV. 140 (1957).

[25] In Reid v. Covert Mr. Justice Black, disagreeing with the majority of the Court, said we must read Art. I, § 8, cl. 14, in isolation, rather than with the Necessary and Proper Clause. Even conceding this, arguendo, the absence of a feasible substitute for overseas court-martial jurisdiction should be an important practical consideration when we undertake judicially to define the limits of the "armed forces." See text at pages 14–15, *supra*.

vide the constitutional procedures for overseas trials of U. S. civilians; (e) provide by employment contracts that these employees subject themselves to court-martial jurisdiction for trial of crimes committed outside the United States; (f) make no attempt to punish these civilian employees for any crimes they might commit overseas, instead merely discharge them.[26]

[26] (a) This would not accomplish the desired result: it would not secure for these persons either trial by jury or indictment by grand jury. Furthermore, it is utterly impractical from the important standpoint of personnel management. Some of the skilled technicians probably command higher wages than generals; yet their jobs require them to work side-by-side with enlisted and non-commissioned personnel.

(b) Like the first suggestion, this also fails to guarantee the sought-for constitutional rights. In some cases it might result in subjecting United States citizens to bizarre or "cruel and inhuman" punishments. In addition, if the employees were stationed in some barren area, not actually under the control of any government (*e. g.*, Antarctica) this alternative would not be available.

(c) This would tend to deprive the accused of the benefit of friendly witnesses. It would violate the fundamental principle that trial should be held where the crime occurred, a principle fought for in the Revolutionary War. In the DECLARATION OF INDEPENDENCE, one of the grievances listed charged the English with "transporting us beyond Seas to be tried for pretended offenses." See also Blume, *The Place of Trial of Criminal Cases*, 43 MICH. L. REV. 59 (1944); Note, *Criminal Jurisdiction over Civilians Accompanying American Armed Forces Overseas*, 71 HARV. L. REV. 712, 717–18 (1958).

(d) This would collide with the sovereign rights of the country where the crime was allegedly committed. Under the present "Status of Force" agreements these countries have granted us the limited privileges of exercising court-martial jurisdiction over our armed forces and persons serving with them. These agreements constitute a substantial concession won only after lengthy negotiation, and it is extremely unlikely that many countries would be willing to permit us to encroach

The problem of finding an alternative to courts-martial for the trial of *capital* charges against civilian *dependents* was considered by the Supreme Court in *Reid* v. *Covert*.[27] That limited situation does not pose as acute a problem for the administration of discipline in the armed forces as does the absence of any practical jurisdiction over *employees* for *all* charges. As Mr. Justice Frankfurter pointed out,[28] the incidence of capital charges brought overseas against dependents has been so small since the adoption of the Uniform Code of Military Justice that it does not

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further. See *Hearings on Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters Before the Senate Committee on Foreign Relations*, 83d Cong., 1st Sess. (1953); Note, *Criminal Jurisdiction over American Armed Forces Abroad*, 70 HARV. L. REV. 1043 (1957).

(e) There are serious doubts whether such a contract would be valid. Although all of the rights involved here may be waived under certain circumstances, the waiver must be surrounded with certain safeguards. See Adams v. United States ex rel. McCann, 317 U. S. 269 (1942); Patton v. United States, 281 U. S. 276 (1930). In Adams v. United States ex rel. McCann, *supra*, the Court upheld a waiver of trial by jury in the absence of counsel; three justices (Murphy, Black, and Douglas) dissented, and the majority said that "an *accused*, in the exercise of a free and intelligent choice, *and with the considered approval of the court*, may waive trial by jury." 317 U. S. at 275. (Emphasis added.) Here the suggested waiver (by contract) would be made without two of the safeguards the Supreme Court has said are necessary.

(f) Abdication of all legal restraint is unrealistic. It would prejudice the rights and interests of the whole people and of citizens in the overseas community to secure a few rights for a small number; it would tend to break down discipline and would tend to be highly prejudicial to national prestige.

[27] See 352 U. S. 901 (1956); Justice Frankfurter concurring, 354 U. S. at 47–49; Supplemental Brief on Rehearing for Appellant, pp. 40–63; Supplemental Brief on Rehearing for Appellee, pp. 137–59.

[28] 354 U. S. at 47–48.

merit great consideration. The two-phase extension of *Reid* v. *Covert* adopted here by the majority at once intensifies and enlarges the problem of a substitute jurisdiction. Yet, as I have pointed out, there is no adequate substitute and my colleagues appear to acknowledge this for they do not even attempt to suggest one.

This case does not in any sense present the courts with military usurpation of civilian power. The military tribunals exercise jurisdiction only to the extent and precisely on the terms fixed by Congress and the Executive—both elected representatives of the people. Together the Legislative and Executive branches can, at will, modify, revoke or exercise broad and effective supervisory powers over the manner in which this jurisdiction is used. I emphasize this because it points up the restraint and caution judges, and more especially this court, ought to exercise in setting aside the carefully considered joint action of the two coordinate branches of government exercising power thought by most reasonable men to have existed for over a century and a half.[29] We now strike down such action in reliance on the minority views of the Supreme Court with full awareness that there is no other feasible means of dealing with law enforcement concerning civilians at our foreign bases. *Reid* v. *Covert* has been called an invitation to murder, but as Mr. Justice Frankfurter suggested, Americans at overseas bases tend to commit relatively few murders.

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[29] Not controlling, but interesting, is the universal recognition of the UCMJ as the most enlightened military code in history and as affording the basic elements of fairness. This is far from unbridled military power over civilians; it is bridled, harnessed, and hobbled—as it should be—by explicit congressional acts, and subject to the scrutiny of the United States Court of Military Appeals, composed of civilians, and other United States courts via habeas corpus.

The majority opinion here is an invitation to larceny and every other one of the vast array of crimes within the reach of human ingenuity. We are left only with a qualified hope that these offenders may be subject to dismissal from "public service" if the offense can be established. I am unable to join in this kind of judicial negativism which strikes down sound, historically supported legal action and leaves a vacuum which cannot be filled.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Habeas Corpus 123–57

No. 14,304

UNITED STATES OF AMERICA, EX REL DOMINIC GUAGLIARDO, APPELLANT

v.

NEIL H. MCELROY, SECRETARY OF DEFENSE, DEPARTMENT OF DEFENSE, ET AL., APPELLEES

September Term, 1958.

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Chief Judge, and Fahy and Burger, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District

Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court for further proceedings consistent with the opinion of this Court.

Dated: September 12, 1958.

Per Circuit Judge Fahy.

Separate dissenting opinion by Circuit Judge Burger.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,630

ALBERT H. GRISHAM, APPELLANT

v.

JOHN C. TAYLOR, WARDEN OF UNITED STATES PENITENTIARY AT LEWISBURG, PENNSYLVANIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued October 24, 1958

Before GOODRICH, MCLAUGHLIN and KALODNER, *Circuit Judges.*

OPINION OF THE COURT

(Filed November 20, 1958)

By GOODRICH, *Circuit Judge.*

This is an appeal from a district court decision denying the petitioner habeas corpus, 161 F. Supp. 112 (M. D. Pa. 1958). Albert H. Grisham was a civilian accountant employed by and serving with the United States Army in France. While assigned overseas Grisham and his wife resided in a rented apartment in Orleans. Grisham was arrested by French officials

as a result of the death of his wife in December, 1952. At the request of the Army he was turned over to military authorities and was charged by them with the premeditated murder of his wife, a capital offense. 10 U. S. C. § 918 (Supp. V, 1958). He was tried by a court-martial and convicted of unpremeditated homicide. Having been sentenced to prison, he now seeks release on habeas corpus proceedings.

The foundation of this petition is the Supreme Court's decision in *Reid v. Covert*, 354 U. S. 1 (1957): Our difficulty in this case is to make up our minds how far *Reid v. Covert* takes us. One thing is clear. Under that decision the wife of a man in military service who accompanies her husband abroad cannot in peacetime be tried in a foreign country by a United States military court-martial for a capital crime. But the opinion by Mr. Justice Black was joined by only three of his colleagues. Two others, Mr. Justice Frankfurter and Mr. Justice Harlan, rendered separate concurring opinions and two, Mr. Justice Clark joined by Mr. Justice Burton, dissented.[1]

The district court, disposing of the instant case, relied largely on Judge Holtzoff's opinion in *United States ex rel. Guagliardo v. McElroy*, 158 F. Supp. 171 (D. D. C. 1958). But that decision was overruled by the Court of Appeals for the District of Columbia Circuit by a divided court (2–1). — F. 2d — (D. C. Cir. 1958). *Guagliardo* involved the same statute as that in the *Covert* case. It is article 11 of the Uniform Code of Military Justice, 10 U. S. C. § 802 (11) (Supp. V, 1958), which reads as follows:

> "(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law,

[1] Mr. Justice Whittaker took no part in the consideration or decision of the case.

> persons serving with, employed by, or accompanying the armed forces outside the United States. * * *"

are subject to the authority of the courts-martial described by the statute.

In the *Guagliardo* case the petitioner was a civil service employee of the Air Force. The crime with which he was charged was not a capital crime but larceny. The District of Columbia Circuit Court said that it was not going to decide any constitutional question: that since the Supreme Court had said the section of the Military Justice Code when applied to persons "accompanying the armed forces" was unconstitutional the whole clause fell.

With due deference to a very competent court, we cannot join in this ground for granting a habeas corpus writ. The statute in question expressly contains a reservation clause providing:

> "If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications." Pub. L. No. 1028, 84th Cong., 2d Sess., 70 A. STAT. 640 (Aug. 10, 1956).

We think this provision controls, and that we must look to see whether a difference may not exist as to persons "serving with" or "employed by" from those "accompanying" the armed forces.

Granted that authority compels the conclusion that a wife accompanying her husband abroad is not to be tried by court-martial, it does not follow that persons "serving with" or "employed by" the armed forces may not be so tried. At least it does not so follow until the Supreme Court says that it does. We do not get helpful authority, then, from the

Guagliardo opinion except for a reason we cannot share.

So we are confronted with the problem of the application of the *Covert* case to a civilian employee of the armed forces serving abroad, prosecuted for a capital offense in peacetime and tried by court-martial. Grisham was charged in France with premeditated murder, a capital offense. The conviction was for unpremeditated murder which is not a capital offense.

The question involved is one which we think it is fair to say was left open by the language of Mr. Justice Black's opinion in the *Covert* case. On page 22 of Volume 354, United States Reports, he says:

> "Even if it were possible, we need not attempt here to precisely define the boundary between 'civilians' and members of the 'land and naval Forces.' We recognize that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform."

We do not make this quotation to prove that Mr. Justice Black concluded there was a difference; only to show that the possibility was in his mind and no commitment on the point made.

We think that this civilian Army employee presents a different case from that of a soldier's wife and that the weight of consideration tends to support the argument for permitting Congress to subject him to the jurisdiction of the Courts-Martial as the statute provides.[2] The fact that civilian personnel accompanying armed forces have, for a long time, apparently been

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[2] The Constitutional source of Congressional authority is Art. I, § 8, cl. 14: "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces."

treated as subject to discipline by military authorities is a factor supporting this conclusion.[3] This is not conclusive, of course. But things which have long been established practice run less danger of being called unconstitutional than do innovations. See, for instance, *Ownbey* v. *Morgan*, 256 U. S. 94, 112 (1921); *Anderson* v. *Luckett*, 321 U. S. 233, 244 (1944).

There is the practical point. An army can and for years has gone along without wives accompanying it. But civilian employees are essential to the hundreds of things which an army now has to do in addition to fighting. The practical difficulties involved in denying to Courts-Martial jurisdiction over offenses by such people are set out by Mr. Justice Harlan in footnote 12 on page 76 of 354 U. S.[4]

Furthermore, these civilian employees are associating with the Army through their own volition. The soldier may have no choice as to whether he is in the Army or not. Once in, he has no choice about leaving his employment until his term expires. But the civilian can work for the Army or not as he pleases; he can decline to work further if he is told to go where he does not want to go. We think that by voluntarily associating himself with the armed forces it is not unreasonable to put him under the same discipline which members of those forces are under.

Grisham was not living on the Army base at the time of the alleged offense. But he was eligible to receive many privileges which the soldiers got. He

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[3] The Government cites to us authority going back a long time to show that civilians attached to the armed forces have been subjected to military jurisdiction in time of peace. Unfortunately we do not have access to the material cited, some of which is said to be in the National Archives.

[4] See Note, *Criminal Jurisdiction Over Civilians Accompanying American Armed Forces Overseas*, 71 Harv. L. Rev. 712 (1958).

could buy goods at the commissary; he could get medical and dental care; he had the benent of the special armed services postal facilities, special customs privileges, etc. We think, therefore, that the fact that he did not live on the Army base is a matter of no significance.

In other words, Grisham was in the position of the person described by Mr. Justice Black and quoted above. He had not been formally inducted, he did not wear a uniform, but he was as closely connected with the Army as though he had.

We are advised by counsel for the respondent that appeal has been taken in one case involving a similar problem [5] and that certiorari is to be asked for in the District of Columbia case. If the view we have expressed is incorrect there will be opportunity for its correction when the Supreme Court has spoken.

The judgment of the district court will be affirmed.

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[5] *Singleton* v. *Kinsella*, — F. Supp. — (S. D. W. Va. 1958) (noncapital offense by a dependent wife accompanying her service husband overseas in Germany). Direct appeal to the Supreme Court is available under 28 U. S. C. § 1252 (1952).

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